Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1025

CALVIN O. ATKINS,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA

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IN THE

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No._____

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CALVIN O. ATKINS,
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vs

STATE OF WEST VIRGINIA,
Respondent.

_____

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT of
APPEALS OF WEST VIRGINIA

_____

Petitioner, Calvin O. Atkins, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in the case on October 4, 1979.

OPINION BELOW

The opinion rendered by the Supreme Court of Appeals of West Virginia styled *State of West Virginia v. Calvin O. Aktins,* is reported at _____ W. Va. _____, _____S.E. 2d_____ (1979, a copy of which is set out in the appendix at Appendix A, p. A-1. After the Supreme Court of Appeals of West Virginia rendered the above opinion, Petitioner filed a Petition for Rehearing and Reargument, which Petition was denied without an opinion, by Order entered October 4, 1979, a copy of which is set out in the Appendix at Appendix B, p. B-1.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia sought to be reviewed was rendered July 17, 1979. Thereafter, Petitioner filed a Petition with the Supreme Court of Appeals of West Virginia for rehearing and reargument of said judgment, which Petition was denied, without an opinion, by Order entered October 4, 1979. This Petition was filed within 90 days of the date that the Petition for Rehearing was denied. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

(1) Whether the Petitioner was denied due process of law guaranteed by the Fourteenth Amendment when the trial court permitted the State to impeach his credibility by showing that he had been previously convicted of two felonies, thereby imposing a penalty on him for exercising his constitutional right to testify in his own behalf; and further, whether this practice denies a criminal defendant due process of law by detering criminal defendants from exercising their constitutional right to testify in their own behalf.

(2) Whether the Petitioner was denied due process of law guaranteed by the Fourteenth Amendment when the trial court permitted the State to impeach his credibility by showing that he had been previously convicted of two felonies, thereby denying the Petitioner his right to trial by an impartial jury guaranteed by the Sixth Amendment.

(3) Whether the Petitioner was denied equal protection of the laws guaranteed by the Fourteenth Amendment when the trial court permitted the State to impeach his credibility by showing

he had been previously convicted of two felonies, thereby invidiously discriminating against the Petitioner.

(4) Whether the Petitioner was denied due process of law guaranteed by the Fourteenth Amendment when the trial court permitted the entire case for the State to be conducted by a private prosecutor retained by the victim's family in that a privately retained attorney owes his allegiance to his client which prejudicially influences him in the trail of the defendant, thereby infringing upon the defendant's fundamental right to a fair trial.

(5) If it is determined that Petitioner was denied one or more of his constitutional rights, was the Supreme Court of Appeals of West Virginia in error when it determined that the action of the trial court, in permitting the State to impeach the Petitioner's credibility by showing he had been previously convicted of two felonies, was harmless beyond a reasonable doubt.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. Constitution, Amendement III.

Fourteenth Amendment to the United States Constitution, "All persons born or naturalized in the United States, and sub-

ject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". U.S. Constitution, Amendement XIV.

STATEMENT OF THE CASE

This was a criminal proceeding upon an indictment for murder returned at the January 1977 Term of the Circuit Court of Harrison County, West Virginia. Trial was held in the Circuit Court of Harrison County from April 4, 1977 to April 8, 1977, when the jury found the Petitioner guilty of second degree murder of one Joseph Shaffer.

Prior to trial, the Petitioner, Calvin O. Atkins, filed a Motion in Limine seeking to prohibit the State from making known to the jury that the Petitioner had been previously convicted for any crimes or that the defendant had a criminal record.[1] The grounds stated therein were that if any of the above facts were made known to the jury, under the pretense of testing the Petitioner's credibility, it would be highly immaterial, irrelevant, prejudicial, improper and illegal to the Petitioner, even though the court were to instruct the jury regarding the limited pur-

[1]At the time of the trial in this matter, West Virginia followed the rule that a defendant in a criminal trial may have his credibility impeached by showing that he has previously been convicted of a crime. The only limitation was that the trial judge had to conduct an in camera hearing to determine whether or not the prejudicial effect of introducing the prior convictions would outweigh the probative value thereof. If so, the judge had discretion to exclude them. This law was changed by *State v. McAboy*, _____ W. Va. _____, 236 S.E.2d 431 (1977), decided after the trial in this matter, but before the appeal to the Supreme Court of Appeals of West Virginia. *McAboy* held that it is permissible to cross-examine a criminal defendant for the purpose of impeaching his credibility only as to prior convictions for perjury and false swearing. The decision was made retroactive only as to those cases in the appeal process where the point was specifically preserved and therefore applied to petitioner.

poses of such cross-examination and the limited purpose to which the jury may consider such information. The petitioner also requested that the Court conduct an in camera hearing to determine whether the prejudicial effect of such inquiries would outweight the probative value thereof.

In addition, Petitioner filed a pre-trial motion to discharge Gerald Jones as a privately retained prosecuting attorney.[2] Mr. Jones was retained by the victim's family to assist the State in conducting the prosecution of this matter. One of the grounds set forth in this Motion was that allowing a private prosecutor to conduct the trial would be prejudicial to the Petitioner and that the inherent fundamental unfairness of such a practice is a violation of due process of law. (R.2)

On March 15, 1977, a hearing was held on the Petitioner's Motion in Limine as well as Petitioner's other pretrial motions. By Order entered March 22, 1977, the Court declined to rule on the Motion in Limine but reserved the right to determine the merits of the Motion at the time of trial. The defendant's Motion to Discharge the private prosecutor was denied by the above Order of trial court entered March 22, 1977.

Trial then commenced in Harrison County on April 4, 1977. On April 7, 1977, the Petitioner, Calvin O. Atkins, was called to testify in his own behalf. (R. 751). At the conclusion of the direct examination of the Petitioner, the Jury was dismissed and the Petitioner's Motion in Limine was again brought up. (R. 796-800). Petitioner's counsel asserted that the prejudicial effect that such evidence would have outweighed its probative value

[2]West Virgnia Code ch. 7, art. 7, sec. 8, allows for the employment of a private prosecutor. The only qualification of this section is that the private prosecutor must divulge to the jury his compensation.

for the reason that one offense, manslaughter, occurred when the defendant was eighteen and was therefore too remote. (R. 798). Further, it was asserted that the second offense, contributing to the delinquency of a minor, was too unrelated to the present charge and should therfore not be used. (R. 798) After hearing argument on behalf of the State, the Court overruled the Petitioner's Motion in limine holding that it had discretion in the matter and that such evidence would be allowed for the purpose of impeaching the Petitioner's credibility. (R. 799-800)

Thereafter, during the cross-examination of the Petitioner, the State questioned the Petitioner as to the two prior felonies, to which questions, the Petitioner promptly objected. (R. 822-825). The portion of the record wherein this questioning occurred is set forth verbatim in the Appendix at Appendix C, p. C-1.

After the question had been answered by the Petitioner, the Court instructed the jury that they were to consider the evidence only for the pupose of affecting the Petitioner's credibility and not on the issue of guilt on the present charge. (R. 824, 825).

On April 8, 1977, a verdict of murder in the second degree was returned by the jury. On April 12, 1977, Petitioner submitted his Motion to Set Aside the Verdict and Grant a New Trial setting forth therein eighteen separate grounds. The ground set forth in numbered paragraph fifteen was that the Court had erred in allowing the State to cross-examine the Petitioner on prior convictions, one of which occurred 20 years ago and the other was totally unrelated, and that both were highly prejudicial to the Petitioner. Also set forth in paragraph 2 of said Motion was that the Court erred in refusing to allow a private prosecuting attorney. By Order entered April 28, 1977, the Petitioner's Motion to Set Aside Verdict and Grant a New Trial was overruled.

The private prosecutor retained by the victims family, prepared the case, interviewed all the State's witnesses, prepared all of the State's responses and answers to the Petitioner's pretrial motions, prepared all of the written pleadings, prepared all of the instructions, conducted the voir dire, struck the jury, made the opening statement at the trial, questioned all of the witnesses excepting two minor unimportant witnesses, conducted all of the important cross-examination including the cross-examination of the Petitioner, made all of the objections during the trial, and all of the arguments during the trial on the admissibility of evidence, argued the instructions before the Court, and finally above all, conducted the closing argument alone in which closing argument the prosecuting attorney of Harrison County did not participate.

The private prosecutor prepared and tried this felony case in the Circuit Court of Harrison County without the assistance in any manner whatsoever of the prosecuting attorney of Harrison County or his staff; the private prosecutor made all of the decisions, argued all of the motions and exclusively was in complete control of the trial, and at no time did the prosecuting attorney of Harrison County participate in any meaningful manner. The Petitioner's Motion for a New Trial was handled by the private prosecutor and he argued in opposition thereto.

Thereafter, on September 27, 1977, Petitioner filed his Petition for Writ of Error and Supersedeas in the Supreme Court of Appeals of West Virginia, asserting as grounds for reversal therein, that the Petitioner was prejudiced by the admission into evidence of his two prior convictions and that he had been pre-

judiced by the court's action of permitting a private prosecuting attorney to conduct the State's case.[3] This Petition was refused on November 21, 1977 without any written opinion.[4] Petitioner refiled his Petition for Writ of Error and Supersedeas with the Supreme Court of Appeals of West Virginia on November 28, 1977, which Petition was again refused without any written opinion on December 19, 1977. Petitioner then refiled his Petition a third time on December 22, 1977 which Petition was granted on February 13, 1978. All three of the Petitions asserted as grounds for reversal that the Petitioner had been prejudiced by having his two prior convictions admitted into evidence, and by allowing a private prosecuting attorney to conduct the case for the State.

By opinion filed July 17, 1979, the Supreme Court of Appeals of West Virginia affirmed the Petitioner's conviction.[5] The State, in its brief, confessed that it was a violation of *State V. McAboy,*_____ W. Va._____, 236 S.E.2d 431 (1979),[6] to permit the State to impeach the Petitioner on cross-examination by questioning him in connection with his two prior criminal convictions. Therefore, the only question before the Supreme Court of Appeals of West Virginia in regards to the prior conviction evidence was whether or not the violation of State v. McAboy, supra, was reversible error. The Court then held that under the doctrine of harmless error announced by this Court in *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d

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[3]West Virginia Code ch 58, art 5, sec 1, 1931 provides "a party to a controversy in any circuit court may obtain from the Supreme Court of Appeals, or Judge thereof in vacation, an appeal from, or a Writ of Error or Supersedeas to, a judgment, decree or order of such circuit court in the following cases....(j) in any criminal case where there has been a conviction in a circuit court..."

[4]West Virginia Code ch 58, art 5, sec 10, 1931, as amended provides: "The court of judge to whom a petition is duly presented, if of the opinion that the decision complained of ought to be reviewed, may allow an appeal..."

[5]The opinion is set forth in the Appendix at Appendix A, p. A-1.

[6]See Note 1, supra.

705, 87 S.Ct. 824 (1967), that the violation of *State v. McAboy, supra,* was harmless beyond a reasonable doubt. Further, the court held that the practice of employing private prosecutor was permissible under West Virginia law and that therefore Petitioner was not prejudiced thereby.

Petitioner then presented his Petition for Rehearing and Reargument within the prescribed time which Petition was denied by Order of the Supreme Court of Appeals of West Virginia on October 4, 1979.[7]

REASONS FOR GRANTING THE WRIT

The cross-examination of the petitioner as to his two prior convictions were extremely prejudicial and denied the Petitioner due process and equal protection guaranteed by the Fourteenth Amendement and further denied him the right to an impartial jury guaranteed by the Fourteenth Amendment. Further, the violation of these rights was not harmless beyond a reasonable doubt under the principles enunciated by this Court in *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967).

It has long been recognized that every criminal defendant has a right to testify in his own defense. That right is "basic in our system of jurisprudence" and implicity guaranteed by the Due Process Clause of the Fourteenth Amendment. *In Re Oliver,* 333 U.S. 257, 273, 68 S. Ct. 499, 507 92 L. Ed 682 (1948), *Hovey v. Elliot,* 167 U.S. 409, 417-417, 17 S. Ct. 841, 42 L. Ed. 215 (1897).

While technically a defendant with prior convictions may still

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[7]A copy of this Order is set out in the Appendix at Appendix B, p. B-1.

be free to testify, the admission of prior convictions to impeach credibility is a "penalty imposed by the courts for exercising a constitutional privilege". *Griffin v. California,* 380 U.S. 609, 614, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106 (1965). That penalty "cuts down on" the right to testify "by making its assertion costly". Griffin, 380 U.S. at 618, 85 S. Ct. 1229.[8]

Despite this burden imposed on the defendant who elects to take the stand and testify in his own behalf, the majority of the courts in this country continue to allow the practice on the supposed justification that the probative value of such evidence outweighs the prejudicial effect thereof. Still other courts justify the practice on the basis that a limiting instruction by the court that the jury is to consider such evidence only on the issue of the defendant's credibility and not on the issue of guilt is sufficient to overcome any such prejudicial effect. This reasoning ignores what studies have shown and what commentators have long been saying.

That the threat of the use of prior convictions operates to keep the defendant from taking the stand is statistically supported in *Kalvin and Zeizel, The American Jury,* Table 43, page 160 (1966). The cases sampled were ranked in three categories: clear for acquittal, close, and clear for conviction. In the average of all categories, the defendant with no record testified in 91 percent of the cases, while the defendant with a record testified in 74 percent of the cases. Of even more significance was the category where the case was clear for acquittal. The defendant without a record testified 90 percent of the time, while the defendant with a record testified only 53 percent of the time. This study shows that the practice of permitting the in-

[8]Holding that prosecutorial comment on a defendant's failure to take the stand is an unconstitutional burden on his right not to testify.

troduction into evidence of prior convictions to impeach the defendants credibility forces him to forego his constitutional right to testify, thereby denying him due process of law.

As to the prejudicial effect that the defendant's failure to testify has on the jury, Table 52 in *The American Jury, supra*, at page 160, reveals that in the cases sampled where the defendant had no record and took the stand, the acquittal rate was 65 percent. In contrast with the cases sampled of the same quality of evidence where the defendant did not take the stand, the acquittal rate was 38 percent.

The above studies reveal that the practice of allowing a criminal defendant to have his credibility impeached by showing prior convictions, has a chilling effect that retards the defendant from taking the stand, thereby violating his due process rights. Concomitantly, the presumption of innocence is impaired in the eyes of the jury, which conceives that the defendant's failure to testify, notwithstanding instructions to the contrary, is an indication of guilt.

Therefore, it is submitted that by allowing a defendant to have his credibility impeached by showing he has previously been convicted of a crime, is a denial of his due process rights in that it imposes a penalty for exercising the constitutional right to testify in ones own behalf. This penalty places a chilling effect on the exercise of this privilege and forces many defendants to forego the privilege entirely for fear the prejudicial effect such evidence would have on the jury would be too great to overcome.

Apart from the deterrent effect that such a practice has on the defendant's decision whether or not to take the stand, there are

unquestionable prejudicial effects that prior crime evidence has upon the jury, thereby denying the defendant an impartial jury, which is guaranteed him by the Sixth Amendment.

This notion of prejudice encompases two distinct tendencies of jurors. The first is the tendency to convict a man of the crime charged, not because he is guilty of the offense, but because evidence introduced indicates that he had committed another unpublished crime or that he is a "bad man" who should be incarcerated regardless of his present guilt. 1 Wigmore §57, at 456; id. §194, at 650. A conviction for this reason would violate the principle that a man may be punished only for those acts with which he has been charged. See: *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 357 (1795). The second tendency is to infer that because the accused committed one crime, he committed the crime charged. 1 Wigmore, §194, at 650.

This fear of prejudice has caused all Anglo-American courts to exclude other crimes evidence for the purpose of proving guilt. McCormick, Evidence §157 (1954). Yet, virtually all American courts continue to permit such evidence for the purpose of impeaching credibility. This distinction is frequently justified on the grounds that the jury is instructed to consider such evidence on the issue of credibility only. However, the limited effect such instructions have on juries has long been recognized.

In *Nash v. United States,* 54 F. 2d 1006, 1007 (2nd Cir. 1932), Judge Hand recognized the inherent inability of jurors to compartmentalize evidence and characterized limiting instructions as "the recommendation to the jury of a mental gymnastic which is beyond, not only their power, but anybody's else." 54 F. 2d at 1007. Further, Mr. Justice Jackson, in his concurring

opinion in *Krulewitch v. United States,* 336 U.S. 440 at 453 (1949), stated that "[The] main assumption that prejudicial effects can be overcome by instructions to the jury....all practicing lawyers know to be unmitegated fiction".

It is submitted that these prejudicial effects deprive a defendant of his right to a fair and impartial jury as defined by this Court in *Sheppard v. Maxwell,* 384 U.S. 333 (1966), and guaranteed by the Sixth Amendment.

In *Tumey v. Ohio*, 273 U.S. 510 (1926), this Court held that: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law". 273 U.S. at 532.

Further, it has been recognized that prior crime evidence has little, if any, true relevance to the issue of credibility, save prior convictions for crimes involving dishonesty such as perjury and false swearing. Therefore, the practice of permitting such evidence on the issue of credibility has little, if any, justification in light of the prejudicial consequences that arise by such a practice.

Therefore, it is submitted that the introduction of prior crime evidence, with or without a limiting instruction, denies the defendant due process of law by denying him his Sixth Amendment right to an impartial jury.

Finally, it is submitted, the admission of prior convictions for the purpose of impeaching the credibility of a defendant denies

the defendant equal protection of the laws guaranteed by the Fourteenth Amendment, because such a practice invidiously discriminates against defendants with a prior record.

A defendant, without a crinimal record, can testify without suffering the deleterious effects of having a criminal record introduced into evidence to impeach him, while the defendant with a criminal record is prejudiced by the introduction into evidence of his prior convictions once he takes the stand to testify. Such a practice is an unreasonable classification and should be considered an invidious discrimination because of the lack of a reasonable nexus between all crimes in general and a persons tendency to testify truthfully.

Further, the impeachment doctrine effects ananomalous distinction between defendants with and those without a criminal record in the exercise of the right to testify in their own behalf.

Apart from use of the prior convictions to impeach the petitioner, the use of a private prosecutor to conduct the entire case on behalf of the State was also highly prejudicial to petitioner and denied him due process of law. This position is asserted because of the ethical conflict of interest that inheres in the practice of employing private prosecutors.[9]

A fundamental requirement of due process is that a criminal defendant receive a fair trail before a fair tribunal. *Groppi v. Wisconsin,* 400 U.S. 505 (1971).

In *Tumey v. Ohio*, 273 U.S. 510 (1927), this court held that

[9]See: Sidman, The Outmoded Concept of Private Prosecution, 25 Am. University L. R. 754 (1976).

where the mayor of an Ohio town was paid from costs and fines he imposed on traffic offenders, the procedure violated due process of law because of the pecuniary interest of the judge in the outcome of the proceedings.

> "That officers acting in a judicial or quasijudicial capacity are disqualified by their interest in the controversy to be decided is of course, the general rule....[I]t certainly violates the fourteenth amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." 273 U.S. at 522-523.

Thus, the court did not limit its prohibition to judges with financial interests in criminal proceedings, it also included "quasi judicial" personnel. It has often been stated that prosecutors act in a quasi-judicial capacity, therefore, it is submitted that when a private prosecutor plays a role at trial, he too is fulfilling a quasi-judicial function because he is performing prosecutorial tasks.

The presence of such a private prosecutor creates a situation of inherent bias or prejudice which denies a criminal defendant due process. The private prosecutor is employed by the victim's family whose only limited and narrow objective is to see that the defendant is convicted and punished. Thus, the family is the private prosecutor's client, and this is to whom he owes his allegiance. This allegiance conflicts with the broader interest to which a public prosecutor is sworn to uphold, being the interest in seeing that substantial justice is served in the prosecution of a criminal case.

The public prosecuting attorney wields great power with respect to the states investigatory forces, decides whom to indict

and prosecute, decides what evidence to submit to the court, negotiates the State's position in plea bargaining and recommends punishment to the court. It is submitted that the entry of a private prosecutor into a criminal prosecution exposes all of these area to prejudicial influence and that such exposure denies the defendant the fundamental fairness guaranteed by the Fourteenth Amendment.

As to whether or not these violations were harmless error, it is submitted that in the trial of this action, they were not harmless beyond a reasonable doubt. The Supreme Court of Appeals of West Virginia reasoned that the State had proved their case beyond a reasonable doubt because several of the State's witnesses had testified that the petitioner did shoot Joseph Shaffer and that there was no physical altercation between the two prior to the shooting. Further, the court reasoned that the introduction of the petitioner's two prior convictions had no prejudicial effect on the jury because of the limiting instruction given by the trial court, and because the error was tangential and did not relate directly to the petitioner's defense of self defense. It is submitted that this reasoning is erroneous for the following reasons.

First, the petitioner never denied shooting Joseph Shaffer. Rather, the petitioner admitted the shooting but relied on the defense of self defense. Therefore, it was necessary for the jury to find that the petitioner was in fear of death or great bodily harm. With the petitioner's two prior convictions in evidence, especially the one for manslaughter, it is impossible to tell whether or not the jury simply believed the State's evidence or whether the two prior convictions prejudiced the jury against the petitioner so that they would have convicted him regardless of the quality of the State's evidence. As stated previously, there

is a noted tendency on the part of jurors to act upon prior crime evidence adversely to a defendant. Jurors have the tendency to convict a man of the crime charged not because he is guilty of the offense, but because the prior crime evidence introduced indicates that he is a "bad man" and thus should be incarcerated. 1 Wigmore §57 at 456; id. §194, at 650. Jurors also have a tendency to infer that because the accused committed one crime, he committed the crime charged. 1 Wigmore 194, at 650.

Therefore, it is impossible to say whether the jury was so prejudiced against the petitioner that they convicted him solely on the basis of the prior crime evidence introduced, or whether they acted impartially on all of the evidence introduced. For that reason, the conclusion reached by the Supreme Court of Appeals of West Virginia that the error was harmless beyond a reasonable doubt is erroneous.

Second, the West Virginia Supreme Court of Appeals reasoned that the limiting instruction given by the trial court as to the prior crime evidence reduced or eliminated its prejudicial effect on the jury. Again, as mentioned previously, the limited effect such instructions have upon a jury is well known. As Mr. Justice Jackson stated in his concurring opinion in *Krulewitch v. United States,* 336 U.S. 444 at 453 (1949);

> "[The] naive assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated action."

Finally, it is submitted that because there was conflicting evidence as to the circumstances of the shooting, the possibility that the prior crime evidence had a prejudicial effect on the jury becomes even more substantial. The prior crime evidence could have substantially prejudiced the jury against the petitioner

thereby becoming the deciding factor in the jury's final verdict in this matter.

Petitioner is asserting a violation of his constitutional rights through a practice that is but a remnant from a barbaric past. It stands as one of the last vestiges of the common law harshness that denied the accused the right to testify in his own behalf and which forever barred a person convicted of a felony from giving testimony. Lawyers, jurists and commentators have long recognized that the prejudicial effect such evidence has on juries far outweighs its relevance on the issue of credibility. This practice is fundamentally unfair to criminal defendants thereby denying them their constitutional rights under the Sixth and Fourteenth Amendments.

Further, petitioner is asserting a violation of his constitutional rights because of the entry of a private prosecutor into his trial. The ethical problems and possible prejudices that arise from such a practice when considered in light of the negligible benefits that society gains from it, suggests that private prosecution is an outmoded concept that serves no useful purpose within the American scheme of criminal justice and which further denies a criminal defendant of the fundamental fairness guaranteed him by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons it is respectfully submitted that a writ of certiorari should issue to review the opinion of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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APPENDIX A

Justice Harshbarger dissents and reserves the right to file a dissenting opinion.

NO. 14133

STATE OF WEST VIRGINIA

v.

CALVIN O. ATKINS

Harrison County Affirmed.

Miller, Justice

1. The right to obtain a private prosecutor in this State is not absolute and is subject to judicial control and review. A private prosecutor is subject to the same high standards of conduct in the trial of the case as is the public prosecutor.

2. Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

3. It is not improper on cross-examination to direct a witness to specific previous testimony of another witness and ask the witness whether he agrees or disagrees with such testimony. It is objectionable on cross-examination to require a witness to state whether another witness' testimony is true or false, since this is the ultimate question that a jury must decide. However, the failure to sustain an objection to such improper question will not necessarily result in error, unless the technique has been used so pervasively and abusively in the cross-examination as to substantially distort the witness' testimony on critical trial issues.

Miller, Justice:

In this appeal the defendant, Calvin O. Atkins, challenges his second degree murder conviction on two principal grounds. First, he challenges the validity of the practice relating to the employment of a private prosecutor to assist the public prosecutor. Second, he alleges the trial court erred in permitting the State to impeach the defendant by questioning him on cross-examination as to his two prior criminal convictions, a practice condemned by this Court in *State v. McAboy,* W. Va. , 236 S.E.2d 431 (1977).

I
PRIVATE PROSECUTOR

Defendant urges us to declare that the practice of employing a private prosecutor to assist the public prosecutor is an anachronism and that it should be abolished on the ground that it essentially leads to overzealous and unfair criminal prosecution. He also contends that in the present case, the private prosecutor exceeded normal bounds by virtually trying the entire case. Finally, he asserts error was committed when the trial court refused to require the private prosecutor to disclose the

amount of fee he was receiving to act as private prosecutor.

The right to hire a private prosecutor appears to evolve from the common law, where under old English practice the Crown did not supply a public prosecutor to handle routine felonies. The victim or his family was therefore required to hire counsel to bring the guilty party into the criminal justice system. 1 J. Bishop, *New Criminal Procedure* (2d ed. 1913), p. 245; 63 Am. Jur. 2d *Prosecuting Attorneys* §9; Note, *Private Prosecution -The Entrenched Anomaly,* 50 N.C.L. Rev. 1171 (1972).

W. Va. Code, 7-7-8, explicitly recognizes the practice.[1] This statute make a clear distinction between a special prosecutor, who is appointed by the court because of a disqualification or inability to act on the part of a public prosecutor, and the private prosecutor. We discussed at some length the court appointment of a special prosecutor in *State ex rel. Goodwin v. Cook,* W. Va. , 248 S.E.2d 602 (1978).

The role of a private prosecutor has not received extensive treatment by this Court, although in several cases the specific conduct of the private prosecutor has been discussed. *See, e.g., State ex rel. Moran v. Ziegler,* W. Va. , 244 S.E.2d 550 (1978); *State v. Lohm,* 97 W. Va. 652, 125 S.E. 758 (1924); *State v. Stafford,* 89 W. Va. 301, 109 S.E. 326 (1921). In none of these cases, however, was there a total challenge to the employment of a private prosecutor.

In most jurisdictions the courts have generally upheld the

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[1]W. Va. Code, 7-7-8, in pertinent part reads:

"If, in any case, the prosecuting attorney and his assistants are unable to act, or if in the opinion of the court it would be improper for him or his assistants to act, the court shall appoint some competent practicing attorney to act in that case....*No provision of this section shall be construed to prohibit the employment by any person of a practicing attorney to assist in the prosecution of any person or corporation charged with a crime.*" [Emphasis supplies]

private prosecutor system against some specific claim of error without having to deal with the merits of the system as a whole. *See, e.g., Powers v. Hauck,* 399 F. 2d 322 (5th Cir. Tex. 1968); *Brooks v. State,* 45 Ala. App. 196, 228 So. 2d (1969); *Thomas V. State,* 59 So. 2d 517 (Fla. 1952); *Territory v. Chong Chak Lai,* 19 Hawaii 437 (1909); *State v. Bartlett,* 105 Me. 212, 74 A. 18 (1909); *Commonwealth v. Knapp,* 27 Mass. (10 Pick.) 477, 20 Am. Dec. 534 (1830); *Goldsby v. State,* 240 Miss. 647, 123 So.2d 429 (1960); *Baca v. Padilla,* 26 N.M. 223, 190 P. 730 (1920); *State v. Best,* 280 N.C. 413, 186 S.E.2d 1 (1972); *State v. Kent,* 4 N.D. 577, 62 N.W. 631 (1895); *Lopez v. State,* 437 S.W.2d 268 (Tex. Crim. 1968); *contra, State v. Harrington,* 534 S.W.2d 44 (Mo. 1976).

We observe initially that W. Va. Code, 7-7-8, does not affirmatively authorize the system of private prosecutors. The specific statutory language is nothing more than a proviso or exception designed to demonstrate that the Legislature did not intend to abolish the common law rule permitting the employment of a private prosecutor.[2]

We do not agree with the defendant's contention that the right to retain a private prosecutor should be abolished. The right to obtain a private prosecutor in this State was never absolute and was always subject to judicial control and review. In *State ex rel. Moran v. Ziegler, supra,* we clearly established that a private prosecutor is subject to the same high standards of

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[2]The specific provision of W. Va. Code, 7-7-8, relating to private prosecutors, is:

"No provision of this section shall be construed to prohibit the employment by any person of a practicing attorney to assist in the prosecution of any person or corporation charged with a crime."

We recognize that there is a distinction between a "proviso" and an "exception." *See, e.g., Eaton v. County Court,* 140 W. Va. 498, 85 S.E.2d 648 (1955); *State v. Cunningham,* 90 W. Va. 806, 111 S.E. 835 (1922). For the present purpose, it is clear that no matter which term is applied to the language of W. Va. Code, 7-7-8, that section does not operate to authorize the assistance of a private prosecutor.

conduct in the trial of the case as is a public prosecutor. This rule blunts, if it does not entirely dissipate, the major criticism of private prosecutors, that they will be overzealous to convict and consequently ignore the public prosecutor's fundamental obligation to do justice.[3]

There are several positive reasons for retaining the right to employ a private prosecutor. First, we recognize that there may be occasions when the public prosecutor is in need of assistance in order to carry out his duties effectively.[4] Second, there may be those occasions when the employment of a private prosecutor would satisfy the public's concern that a given case is not being given perfunctory treatment. Finally, it is not inappropriate to consider that in certain cases, the victim's family may wish to satisfy itself that the case is being vigorously prosecuted.

While we recognize that there are legitimate reasons for retaining private prosecutors, we emphasize again that the right is not absolute. The ultimate responsibility for permitting the participation of a private prosecutor rests with the trial judge. A competent public prosecutor should ordinarily not be forced to accept a private prosecutor as an associate. It should also be stressed that our recognition of the role of a private prosecutor does not imply that he should be favored for selection as special prosecutor where the regular prosecutor is disqualified under W. Va. Code, 7-7-8.

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[3]While not at issue in the present case, most courts have held that a private prosecutor has no right to initiate indictments before the grand jury or to appear before it. *Nichols v. State,* 17 Ga. App. 593, 87 S.E. 817 (1916); *Wilson v. State,* 70 Miss. 595, 13 So. 225 (1893); *Flege v. State,* 93 Neb. 610, 142 N.W. 276 (1913); *Hartgraves v. State,* 5 Okla. Crim. 266, 114 P. 343 (1911). By analogy our case of *State v. Frazier,*, W. Va. , 253 S.E.2d 538 (1979), would suggest this result.

[4]In Syllabus Point 2 of *State v. Pratt,* W. Va. 244 S.E.2d 227 (1978), we counseled against "an oppressive overmatch between prosecutors and defense counsel...." While *Pratt* involved the defense standpoint, it is clear that there may be occasions where the situation is reversed with a newly elected, inexperienced prosecutor.

In regard to the specific errors raised by the defendant, we do not find error in the fact that the private prosecutor did not disclose the amount of his fee. As required by *State v. Lohm*, 97 W. Va. 652, 125 S.E. 758 (1924), he disclosed who had employed him. He also stated that the amount of his fee would be based upon the time spent in connection with the case, an indication that it was to be calculated on a *quantum meruit* basis, and thus could not be determined until the trial had been completed. We are not aware, nor have we been cited any case, where the failure to disclose the amount of the private prosecutor's fee was held to be reversible error.

The defendant also asserts that the private prosecutor dominated the prosecution of the trial and that where the public prosecutor plays only a limited role at trial, error should arise from this fact alone. We decline to adopt such a rule. In *State v. Stafford,* 89 W. Va. 301, 109 S.E. 326 (1921), a similar argument was advanced and rejected. There, as here, the record revealed that the public prosecutor was present at the trial and assisted in the case, although in *Stafford* the public prosecutor left the trial when his wife became seriously ill. Here, the public prosecutor was present throughout the trial. It does appear, however, that he did not participate in the examination of witnesses to the same extent as the private prosecutor.

We do not believe it is possible or desirable to establish an arbitrary line as to the degree of participation of the public prosecutor in the trial. The fundamental question is not the extent of the private prosecutor's participation, but whether his actions result in prejudicial error to the defendant. As previously stated, the private prosecutor is bound to follow the same high standards of conduct in the trial of the case as the public prosecutor, and this should afford the defendant adequate protection.

II
McABOY AND THE RULE OF HARMLESS ERROR

The defendant contends and the State concedes that it was error under *State v. McAboy,* W. Va. , 236 S.E.2d 431 (1977), for the trial court to permit the State, over the objection of the defendant, to impeach him on cross-examination by questioning him in connection with his two prior criminal convictions. The State, however, urges that under the totality of the evidence, the error should be deemed harmless. It is important to note initially that *McAboy* is an evidentiary rule and not a constitutional rule.

Few, if any, trials can be conducted completely free of any error. *See, e.g., Lutwak v. United States,* 344 U.S. 604, 73 S.Ct. 481, 97 L. Ed. 593 (1953). A perfect trial is the ideal, but it can seldom be attained. The central question is what error can be deemed harmless.

The development of the doctrine of harmless error may be a by-product of the increasing complexity of the rules governing the trial of criminal cases. At least one distinguished jurist views the doctrine as a salutary development to free the common law from its rigid rule that any error, no matter how technical, would cause automatic reversal on appeal, irrespective of the error's impact on the jury verdict.[5]

Another commentator has concluded that while cases involving the doctrine of harmless error appear chaotic in their formulation of uniform standards, a unifying principle can be detected: The standard of harmless error must bear a close relationship to the burden of evidentiary proof required in the trial.

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[5]R. Traynor, *The Riddle of Harmless Error* (1970), pp. 3-17.

Thus, a distinction can be made between standards for harmless error in a civil case, where the degree of proof is by a preponderance of the evidence, and in a criminal case, where proof beyond a reasonable doubt is mandated.[6]

Moreover, in a criminal case a further distinction can be and has been made between constitutional and nonconstitutional error. It is generally thought that a constitutional error, because it involves a more fundamental right, carries greater potential for harm than does a nonconstitutional error.

The United States Supreme Court recognized this distinction in *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S.Ct. 824 (1967), and *Cooper v. California,* 386 U.S. 59, 17 L. Ed. 2d 730, 87 S.Ct. 788 (1967). In *Chapman,* the Court set the harmless error standard for a federal constitutional error in holding that "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24, 17 L. Ed. 2d at 711, 87 S.Ct. at 828. In *Cooper,* it stated that where no federal constitutional error was found, "the State is free, without review by us, to apply its own state harmless-error rule to such errors of state law." 386 U.S. at 62, 17 L. Ed. 2d at 734, 87 S.Ct. at 791.

The harmlessness of nonconstitutional error in the federal courts initially arose from former 28 U.S.C. §391, which required the federal appellate courts to "give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." In *Kotteakos v. United States,* 328 U.S. 750, 90 L. Ed. 1557, 66 S.Ct. 1239

[6]See Saltzburg, *The Harm of Harmless Error,* 59 Va. L. Rev. 988-89 (1973).

(1946), the Court elaborated on the meaning of this statute by establishing for criminal cases a nonconstitutional harmless error test:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. [Citations omitted] But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." [328 U.S. at 764-65, 90 L. Ed. at 1566-67, 66 S.Ct. at 1248]

Our own doctrine of harmelss error in criminal cases has not been static. Our earliest decisions followed the rigid common law rule that prejudice is presumed from any error. *State v. Cremeans,* 62 W. Va. 134, 57 S.E. 405 (1907); *State v. Hull,* 45 W. Va. 767, 32 S.E. 240 (1899); *Crookham v. State,* 5 W. Va. 510 (1871).

Exemplifying the rigidity of this rule is *State v. Moore,* 57 W. Va. 146, 49 S.E. 1015 (1905), where the Court reversed jury convictions of first and second degree murder for two jointly indicted defendants because the record revealed that at the beginning of the trial, when they were formally arraigned to answer the indictment, their pleas of not guilty were made by their attorneys and not by the defendants themselves.[7]

[7]We recently overruled this holding in *State v. Grimmer,* W. Va. , 251 S.E.2d 780, 786 (1979), where we concluded that the error was harmless where the entire case had been vigorously tried on the basis of a not guilty plea, even though the record failed to show any plea of not guilty by either the defendant or his counsel.

In our more recent cases, where a nonconstitutional error has been asserted, we have adopted the rather general rule that the case will not be reversed unless the error is prejudicial to the defendant. *State v. Riley*, 151 W. Va. 364, 151 S.E.3d 308 (1966); *State v. Flint,* 142 W. Va. 509, 96 S.E.2d 677 (1957); *State v. Simon,* 132 W. Va. 322, 52 S.E.2d 725 (1949).[8]

Notwithstanding the obvious incompatability between the common law test and our more recent test, there has been no formal recognition of this conflict.

From an overall standpoint, there are two broad categories of trial error. The first category consists of errors relating to the receipt or rejection of evidence, including the ultimate sufficiency of the evidence, and the second category is composed of all nonevidentiary errors.

The realm of evidentiary error in a criminal case consists of two general subcategories. The first is that evidence introduced by the State which is claimed inadmissible, and the second, that evidence offered by the defendant but rejected at trial.[9]

With regard to the first subcategory of evidentiary error, two questions must be addressed in order to determine whether the error is harmless. First, the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impar-

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[8]As to a constitutional level error, we have followed the rule of *Chapman v. California,*386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 1967), that the error must be shown to be harmless beyond a reasonable doubt. *State v. Boyd,* W. Va. , 233 S.E.2d 710 (1977).

[9]Theoretically there is a third and a fourth subcategory - evidence offered by the State but rejected at trial, and evidence offered by the defendant and admitted over the State's objection. These two categories are ordinarily not encountered on appeal, since the State has no right to appeal an adverse verdict.

tial minds of the defendant's guilt beyond a reasonable doubt.[10] If the remaining evidence is found to be insufficient, the error is not harmless. Should it be determined that the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

For all other kinds of error, the test for harmless error involves only the single step of weighing the prejudicial impact of the error on the jury verdict. The reason for this is that it is only when the State has placed inadmissible evidence in the case that there is an initial need to determine the evidentiary sufficiency of the State's case without the inadmissible evidence. The other class of evidentiary error, defendant's evidence rejected by the trial court, has no direct bearing on the sufficiency of the State's evidence.

The same reasoning applies to the second category -nonevidentiary errors. There is ordinarily no necessity to weigh the evidence to determine if it is sufficient to meet the *Starkey* standard, since the error, *viz.*, improper jury selection or prosecutorial misconduct, does not relate to an evidentiary point. The focus is simply the impact of the error on the jury verdict.

We turn now to the application of these harmless error rules to the present case. The admission into evidence of the defen-

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[10]This standard is, of course, our normal standard for appellate review of the sufficiency of the evidence in a criminal trial, as more fully set out in Syllabus Point 1 of *State v. Starkey,* W. Va. , 244 S.E.2d 219 (1978). In *State v. Frazier,* W. Va. , 253 S.E.2d 538 (1979), we recognized that *Starkey's* test for the sufficiency of the evidence on appellate review in a criminal case was similar to the federal rule stated in *Burks v. United States,* 437 U.S. 1, 57 L. Ed. 2d 1, 98 S.Ct. 2141 (1978). The same test has recently been made applicable to federal habeas corpus review of the sufficiency of the state's case., *Jackson v. Virginia,* U.S. , L. Ed. 2d , S.Ct. , 47 U.S.L.W. 4883 (June 28, 1979). Our formulation of this first step of the harmless error analysis is similar to that found in Note 18 of *Kotteakos v. United States,* 328 U.S. 750, 90 L. Ed. 1557, 66 S.Ct. 1239 (1946).

dant's two prior criminal convictions occurred during the State's cross-examination of the defendant. The initial inquiry is whether the State's case, absent this testimony, proved the crime such that impartial minds would be convinced of the defendant's guilt beyond a reasonable doubt.

As is the case with most trials, there was not unanimity among the witnesses as to what occurred. It is undisputed, however, that the pathologist found that the victim's death was caused by five bullet wounds in the back.

A number of the State's witnesses testified that the victim, Mr. Joseph Shaffer, and the defendant together left a Clarksburg bar at approximately 9:00 p.m. on the evening of November 3, 1976. Shaffer had gone to the bar with a companion, a Mr. Wolfe, for the express purpose of finding the defendant. There was a history of prior business and gambling relations between Shaffer and Atkins.

According to the State's witnesses, Shaffer and Atkins argued outside the bar but there was no physical altercation. They did not see Shaffer with a gun, but did see Atkins with a handgun. They observed Shaffer turn his back to the defendant and start to cross the street, at which time the defendant fired the first shot, and Shaffer staggered forward and fell in the street. According to the State's witnesses, the defendant then shot Shaffer, who was lying motionless and face down, several times in the back, left the gun lying next to the victim, and fled the scene.

The defendant, along with several witnesses, testified that Shaffer was carrying a gun in his belt at the time he entered the bar. Both the defendant and his companion, a Mr. Moran,

stated that Shaffer and Wolfe seized each of them by the arm and pulled them outside the bar. Shaffer engaged the defendant in an argument over money and, according to the defendant, Shaffer pulled out his gun, the defendant grabbed for it, and in the ensuing scuffle the gun went off.[11] The defendant was vague about the actual events of the shooting and unable to remember where Shaffer was struck by the bullets. Moran, other than seeing the scuffle and hearing the shots, was also unable to identify where Shaffer was struck. The defendant also had several witnesses who testified as to Shaffer's violent nature.

The State's case was not circumstantial, but consisted of eyewitness testimony. None of the State's eyewitnesses saw Shaffer draw a gun on the defendant nor engage in any physical violence with him prior to the shooting. All of the State's witnesses saw the defendant shoot several times at close range at Shaffer's back. The pathologist testified that Shaffer had been shot five times in the back, and that no entry wounds were found in the front of his body. Excluding the erroneous prior conviction evidence, we are of the view that impartial minds would be convinced that the State did prove its case beyond a reasonable doubt under *State v. Starkey, supra.*

The second step of the harmless error test is to analyze the impact of the error on the jury verdict. The erroneously admitted prior convictions were a conviction for contributing to the delinquency of a minor, in which there was no elaboration of the nature of the underlying charge, and a manslaughter conviction occurring some eighteen years prior to the trial. The trial court instructed the jury that the prior criminal convictions were admitted "for the sole purpose of affecting the credibility of the

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[11]The State's ballistic testimony was that all of the bullets in the deceased were from a 45-caliber gun, which was the type of gun carried by Atkins.

defendant" and were not "proof that he is guilty of the offense here charged."

While our cases state the test as whether the error had a prejudicial impact on the jury, the difficulty is in applying the test. The more tangential the error to the ultimate issue of guilt, the less likely its prejudicial impact.

In any inquiry into the prejudicial impact of the error, we will be guided by whether the record reveals that the error was repeated or singled out for special emphasis in the State's argument. We will scrutinize the record to determine if the error became the subject of a special instruction to the jury, or produced question from the jury. Also of importance is the overall quality of the State's proof. While on appellate review under *Starkey*, the State is entitled to have its case viewed in the most favorable light, this is because the jury's verdict of guilty is taken to have resolved factual conflicts in favor of the State in recognition of the jury's role in evaluating the credibility of the witnesses. If the case contains a number of substantial key factual conflicts or is basically a circumstantial evidence case, or is one that is largely dependent on the testimony of a co-participant for conviction, there is an increased probability that the error will be deemed prejudicial.

Further, if the error is related to critical testimony of the defendant, the more likely that it will be deemed prejudicial. *Cf. People v. Mayrant,* 43 N.Y.2d 236, 401 N.Y.S.2d 165, 372 N.E.2d 1 (1977); *People v. Dickman,* 42 N.Y.2d 294, 397 N.Y.S.2d 754, 366 N.E.2d 843 (1977) (holding prior conviction evidence not harmless in context of New York balancing test for admissibility of prior convictions). A further consideration is the cumulative effect of the error in the context of the entire

trial. We have recognized that there may be error which, standing alone, is not sufficient to require a reversal, but that when cumulated with other marginal error, the combined effect may be sufficient to warrant a reversal. *Cf., eg., State v. Wilson,* W. Va. , 202 S.E.2d 828 (1974) (constitutional and nonconstitutional errors combined).

In the present case, we do not find any of the foregoing factors. the prior convictions were not only stale, but were admitted under a limiting instruction by the court that they could not be considered with respect to the issue of guilt. There was no attempt by the prosecutor to place special or repeated emphasis on the issue. No mention of it was made in the opening statements, and while the closing arguments were not included in the record, defendant does not assert that the State used this issue in its closing argument.

We have discussed the fact that the State's case was built on direct eyewitness account, and not on circumstantial evidence or the sole testimony of a co-participant in the crime. The key factual elements were not substantially disputed by the defendant, and the error did not relate directly to his defense of self-defense. While the prior convictions were directed at impeaching the defendant, their effect must be gauged in the light of the defendant having had other witnesses to corroborate his testimony. Other courts have held that the harmfulness of a prior conviction must be evaluated in light of how evenly the evidence is balanced between the prosecution and the defendant. *Compare, e.g., United States ex rel. Lowry v. Myers,* 364 F.2d 297 (3d Cir. 1966), *and Commonwealth v. King,* 316 A.2d 878 (Pa. 1974) (error held not harmless), *with United States v. Coades,* 549 F.2d 1303 (9th Cir. 1977) *and People v. Morrison,* 67 Cal. App. 3d 425, 136 Cal. Rptr. 650 (1977) (error held harmless).

In viewing the verdict of second degree murder against the backdrop of all the evidence, we cannot conclude that this error had any prejudicial impact on the verdict. We therefore conclude the error was harmless. It should be clearly understood that while the *McAboy* violation in the present case has been found to be harmless error, this should not be construed to mean that we are retreating from the application of the *McAboy* principle in other cases. A prosecutor acts at his peril in violating *McAboy*, and the case will be reversed unless a clear showing can be made that it meets the stringent harmless error standards set out in this opinion.

Finally, the defendant asserts that the trial court erred in permitting one of his witnesses, Roger Gains, to be subjected to cross-examination by the prosecutor through the use of "comparative testimony." Over the defendant's objection, Gains was asked several questions concerning statements by two state witnesses which were in direct conflict with facts that Gains had stated on direct examination. In each instance, after summarizing the particular fact statement made by the State witness, the prosecutor asked Mr. Gains if "you say he is not telling the truth about that?" After an objection by the defense counsel was overruled, Mr. Gains then answered, stating: "That is correct." Defendant urges that this should constitute reversible error since the same practice was condemned in *State v. Ramey,* W. Va. , 212 S.E.2d 737 (1975), *overruled on other grounds, State v. McAboy,* W. Va. , 236 S.E.2d 431 (1977):

> "This practice is to be condemned because, with his other burdens, it forces a defendant to characterize the testimony of other witnesses. In responding, the defendant must either admit the truth of the testimony of such witnesses given against him or, in effect, accuse such witnesses of perjury. Besides placing an unwarranted burden upon the defendant, the tactic invades the province of the jury. It is for that body to resolve the ultimate facts and to give credence and weight to the testimony of witnesses, on proper instructions of the court." [W. Va. at , 212 S.E.2d at 745]

The State contends that *Ramey* is not applicable because it dealt with cross-examination of the defendant, not one of his witnesses, and furthermore, while the practice was condemned, it was not held to be reversible error. *Ramey* relied on the Virginia case of *Plymale v. Commonwealth,* 195 Va. 582, 79 S.E.2d 610 (1954), *overruled on other grounds, Wooden v. Commonwealth,* 208 Va. 629, 159 S.E.2d 623 (1968), which involved a purported oral confession made by the defendant to the sheriff and fire warden, which the defendant denied having given. On cross-examination, the state solicitor asked the defendant if he were accusing the witnesses of falsifying their testimony and committing perjury. The court theorized that a great deal of the harm was the attempt to elicit an accusation of perjury against the sheriff, who was charged with the custody of the jury trying the defendant and who was in the courtroom throughout the trail.

We do not conceive that *Ramey* intended to prohibit any cross-examination of a witness in regard to inconsistencies in his testimony, and specifically, to prohibit cross-examination which requires the witness, in light of the contrary testimony of another, to reconsider his own testimony to determine if he himself were mistaken. Rather, *Ramey* is directed against compelling the witness to give an opinion as to the truth or falsity of another witness' testimony, which is an ultimate fact to be determined by the jury. But, even if what *Ramey* condemns does occur, the question remains as to whether the occurrence is automatically reversible error. We think not.

A number of cases have considered this question, but none has reversed on this point alone. In *State v. Hariott,* 210 S.C. 290, 42 S.E.2d 385 (1947), the court indicated that it was error, but was more concerned with the sufficiency of the evidence proving the defendant's guilt. Later South Carolina cases, while condemning the practice, have not deemed it reversible error. *State v. Avery,* 255 S.C. 570, 180 S.E.2d 190 (1971); *State v. Outen,* 237 S.C. 514, 118 S.E.2d 190 (1971); *State v. Outen,* 237 S.C. 514, 118 S.E.2d 175 (1961). In *People v. King,* 240 Cal. App. 2d 389, 49 Cal. Rptr. 562 (1966), *cert. denied,* 385 U.S. 923, 17 L. Ed. 2d 146, 87 S.Ct. 235, the court stated this type of questioning to be improper, but concluded that it was harmless since the court had sustained an objection to the question.

The Louisiana Supreme Court is somewhat ambiguous on the point. In *State v. Bradford,* 298 So.2d 781 (La. 1974), it sanctioned the technique of cross-examining a witness as to contradiction between his testimony and that of a prior witness. The court acknowledged in *State v. Shaffer,* 260 La. 605, 257, So.2d 121 (1971), on the other hand, that it was improper to cross-examine with the question, "Well, if they testified to the contrary, who would be telling the truth?", but the case was not reversed on this point.

In Illinois, the intermediate appellate courts appear to recognize that cross-examination on contradiction in testimony can be undertaken, and while the witness can be asked if the other witness was "wrong," "mistaken" or "incorrect," it is improper to ask if the other witness' testimony is "true" or "false." *Compare People v. Morse,* 33 Ill. App. 3d 384, 342 N.E.2d 307 (1975), *cert. denied,* 426 U.S. 953, 49 L. Ed 2d 1191, 96 S.Ct. 3179 (1976), *with Ryan v. Monson,* 33 Ill. App. 2d 406, 179 N.E.2d 449 (1961). At least one leading authority appears to

sanction the general practice of exposing inconsistencies by asking the second witness to characterize the accuracy of the first witness' account. C. McCormick, *Law of evidence* §47 (2d ed. 1972), at 100.[12]

We conclude that it is not improper on cross-examination to direct a witness to specific previous testimony of another witness and ask the witness whether he agrees or disagrees with such testimony. We also conclude that it is objectionable on cross-examination to require a witness to state whether another witness' testimony is true or false, since this is the ultimate question that a jury must decide. We do, however, state that the failure to sustain an objection to such improper questioning will not necessarily result in error unless the technique has been used so pervasively and abusively in the cross-examination as to substantially distort the witness' testimony on critical trial issues. Here, we do not find that the comparative testimony technique reached this level, and therefore decline to hold that it was error.

For the reasons stated above, we affirm the judgment of the Circuit Court of Harrison County.

Affirmed.

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[12]The pertinent statement from McCormick is:
"Of course, the contradicting witness may simply state the facts as he asserts them, without reference to the prior testimony which is being contradicted. It seems, however,, that where appropriate the contradiction may be more direct. Thus it would seem acceptable to recite in the question the pertinent part of the prior testimony of the first witness, and inquire, 'What do you say as to the correctness of this statement?' " [Footnote omitted]

Harshbarger, Justice, dissenting:

STATE OF WEST VIRGINIA V. CALVIN O. ATKINS — NO. 14133

With appropriate respect to Judge Traynor and my Brother Miller, and their compelling logical development of the beneficial effects of "doctrines" of harmless error, I have been unable to purge from my mind a persistent suspicion that the rule — semantically elevated to doctrine probably because things that are doctrinal as compared to things that are simply rules, appear to carry more weight — is simply a vehicle for courts to avoid the law where they do not want to enforce it, in hard, unpopular, or politically sensitive cases.

When we cut through all the lacy reasoning, we find, as did the United States Supreme Court in *Chapman v. California,* 386 U.S. 18, 17 L.Ed2d 705, 87 S.Ct. 824 (1967), that the key phrase, quoted by the majority here, is that "the *court* must be able to declare a belief that [an error] was harmless beyond a reasonable doubt." (My emphasis)

Well, any court can, and will as we have done here, declare that an error was harmless, whether the error was constitutional or "merely" evidenciary, upon the subjective notions of its judges about the guilt or innocence of the party against whom the error was committed. Every so-called test by which harmlessness is discovered, involves judicial subjective judgments.

I find it exceedingly difficult to say, without embarrasment, that having prior convictions introduced in a trial is less infectious of the jury's consideration of guilt or innocence than is an

instruction such as is prohibited by our *State v. Pendry*, 227 S.E.2d 210 (1976) following *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). My own subjective judgment about *that,* is that juries are greatly impressed with a defendant's criminal record, probably more so than by any instruction except, perhaps, a binding one requiring a verdict one way or the other.

How can I say whether an error was prejudicial to a defendant? Are our reasonable minds so reasonable? Of course, the facts here seem to weigh heavily against the defendant; but who could say that had not the jury heard about this defendant's prior record, the defense he proffered would not have resulted in a different verdict.

I believe that judicially substituted judicial judgments about what may or may not have occured had error not been involved in a criminal trial, is dangerous practice and should be avoided.

Have we now invited such error by prosecutors? The majority states that a prosecutor acts at his peril, when he violates *McAboy*, and the case will be reversed unless a clear showing can be made that it meets the "stringent harmless error standards set out in this opinion." The stringent standards, when reduced to what they really are, wash out to what we think of the state's case: no one could doubt that "[a]lso of importance is the overall quality of the State's proof" — a matter of judicial opinion — could substitute for deficiencies in all the other listed critieria: the tangentiality of the error, whether the error was highlighted in the government's argument or in instructions, whether there were substantial factual conflicts or if the state's case largly depended upon the testimony of a co-participant, and so forth.

We should stick to the rules, to protect the criminal prosecution process from as many subjective judicial determinations — both at trial and on appeal — as possible. Rules protect everyone. When courts find their violation to be harmless, then they are really no longer rules, no longer have integrity except when judges, subjectively judging each case according to the judges' notions of who should or who should not have the protections they afford, decide to apply them.

I want the benefits of common law and constitutional protections, all of which have evolved to enhance the fairness of the contest between the powerful state and the citizen who is charged with a criminal act. I do *not* want those protections to be subject to discard upon judges' notions about their importance in *my* case. And, in justice, I cannot agree that any other person's right to those protections should be slighter than mine.

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 4th day of October, 1979, the following order was made and entered, to-wit:

State of West Virginia
Plaintiff Below
Defendant in Error

vs. 14133

Calvin O. Atkins

Defendant Below
Plaintiff in Error

The court, having materially considered the petition for rehearing and reargument filed in the foregoing case is of opinion to, and doth hereby deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: _____
Clerk of the Supreme Court of Appeals

APPENDIX C

Q. Are you the same Calvin Atkins who, in March 1958 term of Criminal Court in Harrison County, was indicted for a felony charge that in January, 1958—

MR. SOLOMON: I would object to that. Your Honor, you don't ask the question of whether or not he was indicted. The question is what did he plead guilty to.

THE COURT: The Court will rule that is a proper question. I will overrule the objection to what has gone on this far.

BY MR. JONES:

Q. (continuing) January, 1958, that you did feloniously kill and slay one William K. Spencer?

MR. SOLOMON: That is objectionable. The proper question is: Are you the same so and so, to such charge and such; he is not reading the indictment.

THE COURT: He is entitled to ask about the indictment and plea and sentence imposed by the Court.

MR. SOLOMON: We have an exception.

BY MR. JONES:

Q . And on March 24, plead guilty to manslaughter, as contained in that indictment, in August, 1958, was placed on probation for a period of five years?

MR. ANGOTTI: I would object to the question as propounded, because I believe that the jury, before he answers, should be told the sole purpose, why this question is being asked.

THE COURT: I will instruct the jury at the proper time. You will answer the question.

BY MR. JONES:

Q . Are you the same Calvin Atkins I have described?

A . Yes, sir, I am Calvin Atkins.

MR. ANGOTTI: We will now ask the Court if he is going to do that.

THE COURT: The Court instructs the jury that the question asked and answer given by the Defendant regarding this previous conviction was allowed by the Court for the sole purpose of affecting the credibility of the Defendant. If, in the jury's opinion, it does affect his credibility, it is no proof that he is guilty of the offense here charged and such fact should not be considered by the jury in reaching a conclusion as to his guilt of innocence on the present charge.

MR. ANOGTTI: I believe that the Court should instruct the jury that, since he has answered truthfully, to completely disregard the question and answer.

THE COURT: I have gone as far as I will go.

BY MR. JONES:

Q. Are you the same Calvin Atkins who was indicted at the March 1964 term of the Criminal Court for contributing to the delinquency of a minor by the name of Beverly Ropes, tried and convicted and, in December, 1966, sentenced by the Court to pay a fine of $500.00 and costs?

A. Yes, sir, I was.

THE COURT: The Court instructs the jury that the last question and answer, and the answer given by the Defendant regarding this previous conviction, was allowed by the Court for the sole purpose of affecting the credibility of the Defendant. If, in the jury's opinion, it does affect his credibility, it is no proof that he is guilty of the offense

here charged and such fact should not be considered by you as a conclusion to his guilt on the present charge.

MR. SOLOMON: The Court used language "affecting his credibility". Wouldn't that be testing his credibility? If he truthfully answers the question, it isn't to be considered in any respect.

THE COURT: I am using the language approved by the Supreme Court of Appeals in this State. Anything further?

MR. JONES: You may inquire. (R.822-825)

CERTIFICATE OF SERVICE

I, David L. Solomon, one of counsel for the petitioner and a member of the Bar of the Supreme Court of the United States hereby certify that, on the 28 day of Dec., 1979, I served three (3) copies of the foregoing Petition for Writ of Certiorari on the respondent by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the respondent, Edmond Matko, Prosecuting Attorney, Harrison County Courthouse, Clarksburg, West Virginia 26301, and upon the Attorney General of the State of West Virginia, Capitol Building, Charleston, West Virginia. I further certify that all parties required to be served have been served.

DAVID L. SOLOMON